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The Changes in the Legislator's Conception Reflected in the New Romanian Criminal Code

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Abstract

The present article deals with the changes brought by the New Romanian Criminal Code. We intend to make a comparative analysis of the incrimination legal norms of the old Criminal Code and of those contained by the new active Code, and we also intend to make brief examinations of the ex-novo incriminations and highlight their necessity and opportunity in the legal field and social context.

On the one hand, the study contains an analysis of the new terms and phrases used by the new regulations, because the old criminal settlement - in force from 1969 - used to contain terms, phrases and definitions that didn't correspond to the new social, economic and political realities of our country.

In consequence, many terms, phrases and definitions of the criminal regulations have been changed and/ or simplified, in order to better correspond and to be conform to the new and modern constitutional rules and, also, very important too, to be conform to the rules of the European Law.

On the other hand, there have been introduced in the new Romanian Criminal Code a series of institutions and ruling of the European Court in criminal matters in order to accomplish the requirements of the Court of Strasbourg. We also underline the amendments that have been brought to the content of some offences, and at the same time we analyse the content of the new incriminations. Our study will analyse especially the offences against person and the offences against property.

We intend to highlight the positive aspects, but we will also notice and bring up the debatable and arguable aspects of these changes.

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1. Introduction.

The need for a new criminal code has immediately been felt after the fall of the communist regime, in 1990. At that time, the anterior Criminal Code in force suffered important modifications by revocation of all regulations referring to communist institutions or of the provisions containing concepts specific to the communist period (eg. communal property). Other modifications were made by decriminalization of those deeds incompatible with the compliance to the human rights, as well as of those that represented an obvious restriction to the fundamental freedoms (eg. inducing abortion).

The process initiated in 1990 regarding the changes in the Criminal Code continued throughout the next period, so that practically every year there had been changes and additions worked on its regulations, to the end of adapting the criminal norms to the new political, social and economic realities.

This is the context in which there appeared the need for a new Criminal Law that would ensure a defence as effective as possible for the social values. Naturally, the new Criminal Code was made on the basis of some new concepts, in accordance with the modernist criminal law theories and institutions.

2. The aspects of the new conception in the Criminal code

Basically, the new conception of the criminal legislator on the regulation and defence of social values - for this is the purpose of criminal law - is firstly reflected in the new terminology in use, consisting of either the consecration of some new terms or phrases, or the reconfiguration of several pre-existing terms and expressions whose meaning has been completed or better explained. (Antoniou, 2012, p. 537; Lascu, 2012, p. 23)

At the same time, the new conception of the criminal legislator is reflected in the changes brought to the general criminal law institutions, by the change of the offense definition, of the concept of the causes that remove the criminal nature of the deed, by simplification of the relapse forms and conditions, as well as the sanctioning regime of the plurality of offenses.

One of the most important changes in the general criminal law was the introduction of some new institutions regarding judicial individualization for sentence establishing and enforcing, such as waiving the penalty, delaying its implementation, or changing the combined sanctioning conditions of the underage offenders, by means of waiving the penalty application as well as by diversification of educational measures that can be applied.

In terms of the special part of the New Criminal Code, the most important changes are firstly represented by a new structuring of this Code section, through a change in the crimes sequencing, according to the social value to be protected. Another important change is the new structuring of the titles and chapters incriminating the offenses against life and property, to which we may add the change in content of several offenses according to the concrete means by which one has ascertained they are frequently committed. (Antoniou, 2012, p. 536)

Another new thing is represented by even the *ex novo* incrimination of some recently found facts in the judiciary practice, such as insurance fraud or the misdeeds incriminated by the law of other states, as for example the *obstruction of justice*, though still with a great probability of also being committed in Romania.

Regarding the language, words and expressions used by the legislator in the field literature, one has shown that it is natural for the elaboration process of legal regulations to have the tendency of using clear language, with no ambiguities, in order to make the content of the rule perfectly clear and to avoid opposite interpretations, this necessity becoming even more evident and urgent especially since legal errors are not permitted within the criminal law – whatever their origin may be (ignorance or poor knowledge of the criminal law (Lascu, 2012, p.22).

On the other hand, it is again in the doctrine that one has noticed that sometimes the meaning of the words and expressions used by the legislator within the content of a criminal regulation is not the same with that in the usual language (Lascu, 2012, p.22), or, sometimes it is not the same even between the content of certain regulations, when these belong to different fields of law – for example, the notion of *property*, or that of *ownership*, which in criminal law covers only partially the meaning of the term allotted to civil law.

This is the reason why, as shown in the doctrine (Lascu, 2012, p.22) the meaning of certain words or expressions may be larger or narrower than their meaning in the usual language, fact resulting in the need to define and explain these terms, which may be interpreted in different ways and thereby trigger inconsistent interpretation and

enforcement of laws.

Just as the anterior Criminal Code, the new Code contains norms of interpretation, gathered in the X Title of the general part, norms that comprise the distinct explanation of the words and expressions used in the Criminal Code, either in the general part, or in the special one, in order to avoid their explanation every time they are being used.

Or, the difference of conception of the new criminal code legislator manifests itself to a large extent with regard both to the used terms and the meanings they are given.

3. New notions and expressions used by the new Criminal code

Thus, one must notice that the definitions adopted and kept as they were from the old Criminal Code are very few. On the contrary, most of these definitions are reconfigured, being actually redesigned and completed according to nowadays exigencies within the field to which they belong. An example in this sense is represented by the very notion of *criminal law*, a notion that has been set in accordance to the constitutional regulations, comprising, in the new conception of the criminal legislator, the organic law and emergency ordinances, as well as the normative acts which, on the date of the organic law's entering in force, were sources of criminal law (as the decree-laws) (Lascu, 2012, p.23, Udrioiu, 2014, p. 15).

Another term that has been welcomingly completed is *public servant*, which, in the old criminal code was defined in a general, too vague and imprecise manner.

Yet, the meaning of this term is dependently related to the existence in the Criminal Code of the *work-related offenses*, or of other deeds incriminated by special laws, deeds where the person having the public servant quality can be the subject of these offenses.

Judicial practice has often been confronted with situations in which those accused of having committed *work-related offenses* raised the exception of not having this *public servant* quality, as bailiffs or bank clerks, so that the courts had to interpret each time the *public servant* notion. But the interpretation had an isolated character and therefore one would inevitably get to different interpretations of this notion.

It is no surprise that within this context even the European Court of Human Rights received a complaint against the Romanian state, made by a citizen convicted of a work-related offense, complaint in which it was precisely this lack of public office quality that was being invoked, and the ECHR was the court stating that, indeed, the accused and convicted person had been wrongly considered an official, although, at the time of the offense, there was no clear text of the law that would have expressly established this quality for the function held by the defendant.

Or, as it is shown in the doctrine (Lascu, 2013, p.26), the New Criminal Code brings an important modification in defining this notion, stating clearly, explicitly and in accordance with the exigencies of modern criminal regulation as well as the international conventions in the field, the categories of persons that can be considered to have the *public servant* quality, the new criminal code legislator approaching this institution through administrative and constitutional law. Moreover, it was created the notion of *assimilated public servant*, by regulations of art. 175 par.2 in the Criminal Code, a notion whose emergence was justified by the Drafting Committee of the New Criminal Code by the fact that these categories of persons exercise public authority attributes that have been appointed to them by the competent authorities and are subjected to their control (The New Criminal Code, 2009, p. 32)

Consequently, the doctrine has already interpreted these legal provisions and established that the persons belonging to this public servant category are those having the quality of expert, as well as the other auxiliary members of the judicial activity: lawyers, notaries, bailiffs, mediators, insolvency practitioners, any specialist doctor (human or veterinary), dental technicians, even complementary medicine practitioners, pharmacists, psychologists, architects, tax consultants, nurses, social workers, private detectives, investment consultants (Lascu, 2012, p. 33-34).

Although in the light of these legal provisions we seem to become a society of public servants, in our opinion this is a really auspicious fact, leading to an increased accountability regarding the conduct in the performance of official duties, and, therefore, serves to achieve the purpose of the criminal law, by attracting the incidence of these legal provisions on numerous categories of people who could now commit work-related offenses or corruption offenses.

There are also other words and expressions that have received new definitions and reconfigurations in the New Criminal Code, such as the notion of *public*, a notion whose definition though, unlike that of *public servant* - whose meaning has been extended – was simplified, yet without reducing the incidence sphere of the term. Thus, in art.

176 of the New Criminal Code, the term *public* has been defined as "of anything regarding public institutions, public authorities or other legal entities administering or operating public property assets".

The *family member* is another term with a new configuration exclusively consecrated by the legislator who renounced the concept, somewhat restrictive, of *close relatives*, provided by the previous criminal code. The phrase "family member" includes not only the individuals who may be considered close relatives, in the meaning of the family law, but also all other interpersonal relations that presume cohabitation of some individuals within the same household, namely the spouses, as well as the individuals with similar relations as the spouses or between parents and children, when they live together.

Thus, in the new outlook of the Romanian criminal legislator, the concept of *family member* has an extensive and modern content, in conformity with the actual social reality, acknowledging and assimilating to the notion of *family*, in its extensive content, all situations in which the individuals choose to live together based upon a bond of affection and/or trust.

As specified in the introduction, the New Criminal Code also provides several offences which constitute indictment *ex novo*, offences that are usually committed in the specialized areas of activity. Moreover, the new criminal code incriminates other offences that may be committed in that area of activity, such as the offences of *unauthorized transfer of computer data*, *computer forgery*, *computer fraud* or even *child pornography*, although there are special laws regulating similar offences, such as Law No. 365/2002 on electronic trade, or Law No. 161/2003 regarding the measures for assuring the transparency and the performance of the public office and in the business environment, the prevention and sanctioning of corruption.

The purpose of this latter regulatory act, and especially through the incriminations provided by the Title II of Book I (Art. 34 – 67), was to prevent and suppress the computer crimes, with specific measures of prevention, uncovering and sanctioning the offences committed through the computer systems, and assuring the observance of the human rights and protection of the personal data (Art. 34).

However, the regulatory act does not define the "computer crime" (as neither does the European Council Convention), since, as it was pointed (Georgescu, 2008), such definition is, in reality, very hard to be phrased, due to the great diversity of the criminal aspects which were uncovered so far, but also due to the daily avalanche of criminal activities in this area.

That is precisely why, the phrasing and defining of these terms or notions in the criminal code was absolutely indispensable for the correct understanding and application not only of the new incriminated deeds in the code, but also of those already incriminated in the pre-existing criminal laws, notions such as: *electronic payment instrument*, *informatics system*, *(informatics) data*, or even *child pornography*.

Another phrase used for the first time in the Criminal Code and which is defined in the interpretive law contained in the general part of the code is that of *person exploitation*.

There has been shown in the doctrine (Lascu, 2013, p. 41) that this syntagm is not used for the first time in the Romanian law, since it is also contained in the Law no. 678/2001 regarding the prevention and control of person trafficking, a law adopted by the Romanian state on the basis of some international documents and as a consequence of Romania's ratification of the Children's Rights Convention concerning children sale, child prostitution and child pornography.

But the New Criminal Code presents in the provisions of the article no. 182 a complex definition, more comprehensive and nuanced than that contained in the special law, with five cases in which we can speak of exploitation of persons, namely: subjection to performing a certain kind of work or fulfilling services forcibly, slavery keeping, forcing into prostitution or pornography or into other forms of sexual exploitation, as well as forcing into mendicancy and illegal organ harvesting.

In this context, the deeds accounting for persons trafficking have been introduced in a special chapter, chapter VII from Title I of the New Criminal Code, chapter entitled *Trafficking and Exploitation of Vulnerable Persons*. (Lascu, 2013, p. 44)

On the other hand, although the offense of *mendicancy* was decriminalized, there were incriminated, *ex novo*, three related offenses that can be committed in connection with it, respectively: *mendicancy exploitation* – art. no. 214 of the Criminal Code, *the use of a minor for mendicancy purposes* - art. no. 215 of the Criminal Code, as well as *the use of an exploited person's services* - art. no. 216 of the Criminal Code.

Conclusion

The analysis of the new terms and expressions used by the New Romanian Criminal Code, as well as the new definitions of the already consecrated terms within the criminal law, make proof of a new concept of the criminal legislator, a concept closer to the social and economic realities of the Romanian society, and thereby it can only be truly welcomed.

These changes are also the premise for the hope that the rules of criminal law will fulfil their essential role, that of being the quickest and most effective way of protection of the social values against criminal acts that may affect them.

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